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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of: Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III)	Docket No. 16-CRB-0001 SR/PSSR (2018-2022)

SOUNDEXCHANGE'S BRIEF IN OPPOSITION TO
SIRIUS XM'S RESPONSE TO THE JUDGES' REHEARING ORDER

Pursuant to the Copyright Royalty Judges' April 17, 2018 Order, SoundExchange, Inc., the Recording Industry Association of America, Sony Music Entertainment, Universal Music Group, Warner Music Group, the American Association of Independent Music, the American Federation of Musicians of the United States and Canada, and the Screen Actors Guild and American Federation of Television and Radio Artists, (collectively, "SoundExchange"), through their undersigned counsel, hereby responds to Sirius XM's Memorandum in Response to the Judges' Rehearing Order (May 15, 2018) ("Sirius XM's Brief").

Sirius XM agrees with SoundExchange that in "performing th[e] math" to calculate a percentage of revenue rate, "the Judges intended to maintain the economic integrity of their core determination that the reasonable value of the license at issue is [ ] per subscriber per month." Sirius XM's Brief at 2. Sirius XM even reiterates that "it was plainly the Judges' intent to calculate a revenue percentage which, when applied to Gross Revenues as defined, would yield fees to SoundExchange equivalent to [ ] per subscriber." *Id.*

The problem is that in performing its own math, Sirius XM fails to accomplish what both parties agree was the Judges' goal. Sirius XM's approach, if accepted, would result in a payment

of only [ ] per subscriber for the license at issue. That is because Sirius XM's ARPU incorrectly includes revenues that Sirius XM attributes to the performance of pre-1972 recordings. The Judges have clarified that such revenues are "exempt from any license requirement" and therefore should not be royalty bearing. *See* Amended Restricted Ruling on Regulatory Interpretation Referred by the United States District Court for the District of Columbia at 17, *In the Matter of Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services,* Docket No. 2006-1 CRB DSTRA (2007-2012) (Sept. 11, 2017) ("Ruling on Referral") (quoting 37 C.F.R. § 382.11 Gross Revenue (3)(vi)(D)).[1] Even if the exclusion of pre-1972 recordings is accomplished by means of a "below the line" deduction from Sirius XM's gross royalty exposure, rather than a mathematically equivalent deduction from Gross Revenues,[2] there is no economically sound reason to divide the [ ] per subscriber per month figure (which reflects the "value of the license at issue," Sirius XM's Brief at 2) by an ARPU that includes pre-1972 revenue (which is "exempt from any license requirement," 37 C.F.R. § 382.11 Gross Revenue (3)(vi)(D)). Yet that is precisely what Sirius XM proposes to do.

Sirius XM's proposal to adopt some but not all of the holdings in the Judges' Ruling on Referral and Initial Determination cannot be squared with its professed "complete agreement . . . as to the need to ensure that the ARPU used to convert the intended per-subscriber royalty of [ ] into a percentage of revenue rate . . . match[es] the going forward definition of Gross Revenues." Sirius XM's Brief at 4 n.3. To the contrary, Sirius XM's proposal would

[1] The Judges specifically "interpreted 'exempt from any license requirement' in this regulation to refer to licensing under the federal Copyright Act." Ruling on Referral at 17 n.31.

[2] *See* SoundExchange's Brief in Response to the Judges' April 17, 2018 Order at 5-6 (May 15, 2018) ("SoundExchange's Brief").

undermine "the economic integrity of [the Judges'] core determination," by granting Sirius XM the right to perform post-1972 sound recordings for *less* than [ ] per subscriber, "the reasonable value of the license at issue." *Id.* at 2; *see also* SoundExchange's Brief at 2. *That* would be manifestly unjust.

"The Judges' core rate determination, which is not at issue on the current motion, was that a per-subscriber fee of [ ] best reflects the reasonable fee to be paid by Sirius XM during the 2018-2022 license period." Sirius XM's Brief at 2 (footnote omitted). In order to ensure that copyright owners and artists receive that reasonable fee—the minimum that the Judges concluded copyright owners and artists would insist on, in an unregulated market—the ARPU used to calculate a percentage of revenue rate should include all of the revenue that cannot be excluded from Gross Revenues[3] *and* exclude all of the revenue on which no royalties are payable, all as necessitated by the Judges' Ruling on Referral. As computed in Exhibit A to SoundExchange's Brief, the mathematically and conceptually accurate ARPU that results is [ ], and the resulting percentage of revenue rate is 16.85%.[4] Given that the 15.5% rate established in the Initial Determination is already too low to generate [ ] per subscriber per month in royalties for usage covered by the statutory license, there is no basis for the Judges to depart downward from that rate.

Sirius XM may argue in response that SoundExchange seeks royalties "for" the

[3] This assumes that Sirius XM will actually pay royalties on these amounts during the *SDARS III* rate period. *See* SoundExchange's Brief at 19-20.

[4] These calculations are based on Sirius XM's calculations of the various categories of revenue for the first half of 2016. SoundExchange has no option but to rely on Sirius XM's numbers for purposes of this rehearing. SoundExchange does not concede the accuracy of these numbers for any other purpose, including for purposes of any other proceeding, such as the pending underpayment cases. SoundExchange also does not concede that these numbers are representative of any other period of time.

performance of pre-1972 recordings, a specious contention that, if made, should be rejected out of hand. The parties agree that [ ] per subscriber is "the reasonable value of the license at issue," which is to say a license to perform *post*-1972 sound recordings. Sirius XM's Brief at 2. Thus, the question is how to ensure that copyright owners and artists receive their rock bottom opportunity cost of [ ] per subscriber for recordings covered by the statutory license. Sirius XM has conceded the relevant premises: (a) The proper approach is to divide [ ] by an ARPU that is "commensurate with the going-forward definition of Gross Revenues adopted by the Judges"[5]; and (b) "The Judges properly interpreted subsection (3)(vi)(D) of the Regulations' 'Gross Revenues' definition to exclude revenue attributable to pre-'72 sound recordings, an analysis falling squarely within the Judges' special competence."[6] The unavoidable conclusion is that "pre-'72 revenue" should not be included in the ARPU denominator into which [ ] is divided.[7]

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[5] Sirius XM's Brief at 1.

[6] Sirius XM Radio Inc.'s Memorandum of Law in Response to Order Withdrawing Ruling and Soliciting Briefing on Unresolved Issues at 4, *In the Matter of Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 2006-1 CRB DSTRA (Apr. 24, 2017).

[7] Sirius XM also may argue that SoundExchange did not advance this argument at the trial. But the very same objection would apply to Sirius XM's proposed corrections concerning bundled package revenue and transaction expenses. What matters for present purposes is that, if the Judges are to consider any post hoc calculations in light of the Judges' Ruling on Referral and Initial Determination, then they should consider them all. Moreover, as pointed out previously, at trial SoundExchange advanced several economic theories, including a benchmark theory based on benchmark agreements that included pre-1972 rights. It was consistent with that theory to include pre-1972 revenue in ARPU. *See* SoundExchange's Brief at 11 n.11. But the opportunity cost analysis adopted by the Judges is different, because all that matters for that analysis is that the sellers forfeited revenue from other sources. How that foregone revenue would have been generated (whether from sales of downloads, interactive streaming, videos or pre-1972 music) is irrelevant.

CONCLUSION

For the foregoing reasons, and because Sirius XM's tactical decisions at trial cannot in any event serve as the basis for a finding of manifest injustice (s*ee* SoundExchange's Brief at 14-18), the Judges should not reduce the 15.5% rate established in their Initial Determination.

Respectfully submitted,

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Dated: May 29, 2018

CERTIFICATE OF SERVICE

I, David A. Handzo, do hereby certify that, on May 29, 2018, copies of the foregoing are being filed via eCRB and sent via electronic mail to all parties at the email addresses listed below.

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Dated: May 29, 2018 /s David A. Handzo_____

Certificate of Service

I hereby certify that on Wednesday, May 30, 2018 I provided a true and correct copy of the SoundExchange's Brief in Opposition to Sirius XM's Response to the Judges' Rehearing Order to the following:

Music Choice, represented by Paul M Fakler served via Electronic Service at pfakler@orrick.com

Sirius XM, represented by Todd Larson served via Electronic Service at todd.larson@weil.com

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Signed: /s/ David A. Handzo